No. 14

In the Supreme Court of the United States

October Term, 1949

[redacted], petitioner,

v.

United States of America

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

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OCTOBER TERM, 1949

No. 14

EUGENE DENNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 408–416) is reported at 171 F. 2d 986.

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1948 (R. 417). The petition for a writ of certiorari was filed on November 27, 1948, within the time as extended by order of the Chief Justice, and was granted on June 27, 1949, "limited to the question whether government employees could properly serve on the jury which tried petitioner" (R. 419). The jurisdiction of this Court rests on 28

U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether Government employees could properly serve on the jury which tried petitioner for a violation of R. S. § 102 (2 U. S. C. 192) in failing to respond to a subpoena issued by the House Committee on Un-American Activities.

STATEMENT

On April 30, 1947, petitioner was indicted in the United States District Court for the District of Columbia for a violation of R. S. § 102, in that, having been duly summoned to appear and give testimony before the Committee on Un-American Activities of the House of Representatives, he failed to appear and therefore wilfully made default (R. 3–4).

The evidence adduced at the trial showed that during March 1947, the Committee on Un-American Activities had under consideration two bills relating to the Communist Party (R. 174). On March 18, 1947, petitioner, the general secretary of the Communist Party, requested an opportunity to appear on behalf of the National Committee of the Party. That request was granted. Petitioner was later informed that, as he had requested, he had been allotted two hours to testify before the Committee. (R. 165–166.)

On March 26, 1947, petitioner voluntarily appeared before the Committee. He gave his name

as Eugene Dennis and was then asked whether that was his true name, whether he had any other name, and whether he had used any other name on a passport. Petitioner stated that he was there under the name of Eugene Dennis and would testify only under the name of Eugene Dennis. He refused to answer any questions about his name and refused to state where or when he was born. (R. 168, 219–220.) After about five minutes of this "wrangling over the question of names," the Chairman of the Committee directed that a subpoena be served on petitioner (R. 168, 219–220).

The chief investigator for the Committee thereupon approached petitioner to serve him with a subpoena. Petitioner stood up and said, "In the name of the American people, I hold this committee in contempt" (R. 221). The investigator went up to petitioner and endeavored to hand him a subpoena calling for his appearance on April 9, and stated, "Mr. Dennis, I have a subpoena here for you to appear on April 9" (R. 221). Petitioner folded his arms. The investigator laid the subpoena on petitioner's arm and petitioner turned and walked away (R. 221). Petitioner "tossed [the subpoena] on the table," from which it was later taken by a newspaper man who was present at the time (R. 241–243).

On April 7, the Committee sent petitioner a telegram reminding him that he was under a duty

to appear in response to the subpoena served on March 26 (R. 173–174).

On the morning of April 9, petitioner's name was called before the Committee. He did not respond (R. 250). Mr. Lapidus, who described himself as Secretary of the Communist Party and attorney for petitioner, stood up and said he wanted to read a statement by petitioner[1] (R. 251–252). He was told to leave the statement with the Committee (R. 252). The presiding member of the Committee (see R. 249) stated that the Committee would consider the statement in executive session and determine whether it gave valid reasons for not answering the subpoena (R. 252).

The Committee reported to the House of Representatives that petitioner had been duly served with a subpoena, that a telegram had been sent to him reminding him of his duty to appear, that he had failed to appear, and that his wilful and deliberate refusal was a violation of a subpoena in contempt of the House of Representatives (R. 159–162). The House certified the report of the Committee to the United States Attorney for the District of Columbia for action (R. 158–159), and petitioner was thereafter indicted (R. 3–4).

Prior to trial, petitioner filed a motion and supporting affidavit for a change of venue on the

[1] The statement was in the form of a letter from petitioner to the Committee (see R. 396–407).

ground that he could not obtain a fair and impartial trial in the District of Columbia. He asserted that government employees, who comprise a large part of the District's population, would be afraid to vote for the acquittal of petitioner, a well-known Communist leader, since such action might be construed as such "sympathetic association" with Communism as would endanger their employment and expose them to consequent stigma under the "Loyalty Order" (Executive Order 9835, issued March 21, 1947, 12 F. R. 1935). (R. 27–32.) The motion was denied (R. 41).

Six government employees were among the 12 prospective jurors who were first called to the box and sworn for the *voir dire* examination. In addition to the examination of the jurors collectively on such matters as acquaintance with counsel, members of the Committee on Un-American Activities, employees of the Department of Justice, etc. (R. 47–51),[2] supplementary questions were addressed individually to the six government employees by defense counsel. Juror Borelli stated that although he had worked for the Federal Works Agency since 1938, he would

[2] In view of the explicit instruction (R. 47) that jurors should remain silent unless they intended an answer in the affirmative, the repeated notations in the record of the *voir dire* that "there was no response" indicate, of course, that the several answers of the jurors to the preceding questions were in the negative.

not be influenced in any way in favor of the Government or against petitioner (R. 51–52). Mr. David, a mechanic employed by the Federal Works Agency, stated that he had read of the investigation of the loyalty of government employees under the Executive Order but that he did not expect to be questioned in the event that he voted for petitioner's acquittal. He was excused for cause, however, on the ground that he was a member of the Anti-Communist Association. (R. 53–54, 59, 65–66.) Mrs. Furlow, an employee of the Bureau of the Census for five years, denied that she would be influenced or embarrassed in any way by the loyalty test (R. 54–55). Mr. Grant, a letter carrier employed in the City Post Office for 29 years, was asked by petitioner's counsel: "Do you feel this loyalty test would in any way render you subject to an inquiry if you found a verdict of not guilty in this case," and he replied, "It would not" (R. 55). Likewise, Mrs. Grigsby, a card punch operator in the Bureau of Supplies and Accounts of the Navy Department for four and a half years, stated she did not feel that the loyalty test would in any way affect her judgment in the case (R. 56). Mrs. Groce, an elevator operator at the Veterans Administration for five years, also stated that the loyalty investigation would not prevent her from acquitting petitioner (R. 56–57).

The jurors were then questioned by defense counsel about any connections they might have

with such organizations as the Ku Klux Klan, Knights of the White Camelia, the National Association of Manufacturers, or any group which has "taken a definite stand against the Communist Party, of which the defendant is an officer," and, with the exception of Mr. David, who was excused for cause (*supra*, p. 6), all replied in the negative (R. 59–60, 61). Several jurors answered that they read the Washington Times-Herald and that despite attacks by that newspaper upon the Communist Party, they could give petitioner a fair and impartial trial (R. 60–61). Petitioner's counsel also asked: "It is in my mind that someone might feel—I ask you Government employees that particularly, that even though you concluded a verdict of not guilty was called for in this case, you might still be afraid that that would be considered as having friendly association or friendliness with an officer of the Communist Party. Are you sure that would not affect your minds in any way?" The answer was in the negative. (R. 62.) The jurors also indicated, in response to the court's question, that they could think of no reason why they could not render a fair and impartial verdict solely on the evidence and the instructions given by the court (R. 64).

Despite these answers, petitioner challenged all government employees for cause (R. 64–65). The challenge was denied (R. 65) and the selection of a jury continued. Mrs. Holford, a clerk in the

Department of Commerce, who replaced Mr. David in the box (R. 66-67), was questioned as follows (R. 68):

Mr. McCABE [petitioner's counsel]. You heard the questions I put to the other members of the panel; and I will ask you whether in your past history, association, or feelings or prejudices there is anything which would prevent you from going to that jury box and rendering a fair and impartial verdict in accordance with the evidence as you interpret it?

Juror HOLFORD. No.

Mr. McCABE. You are familiar with the Government loyalty oath investigation?

Juror HOLFORD. I believe I am. I have heard something of it.

Mr. McCABE. Do you feel that rendering a verdict of not guilty in this case, if you come to that conclusion, it would stop you, any criticism or embarrassment among your fellow employees?

Juror HOLFORD. None whatsoever.

Mr. McCABE. Or by your superiors?

Juror HOLFORD. No.

Mr. McCABE. You would not have any thought that would be taken as evidence of friendliness to communism?

Juror HOLFORD. No; I am not worried about my job that way.

Mr. McCABE. I have no further questions.

Mr. FIHELLY [government counsel]. May I ask the same one I did? I take it that if the evidence in this case showed the

guilt of this defendant under the instructions on the law that you could render such a verdict.

Juror HOLFORD. Yes.

The Government exercised its first preemptory challenge to exclude Mrs. Darby, a housewife and former government employee (R. 52, 69). Mr. Howard, who took her place in the box, was not asked his occupation and presumably he was not a government employee. He stated that he would not be affected in any way by the fact that petitioner was a Communist. (R. 69–71.)

Petitioner peremptorily challenged Mrs. Furlow, a government employee (R. 71; see p. 6, *supra*). A non-government employee who was then called indicated uncertainty as to whether she could render an impartial verdict in a case involving a Communist, and, upon the court's invitation, petitioner's counsel challenged her and she was excused (R. 71, 74–75). Mr. Jones, a post office clerk for two or three years, replaced her and the following colloquy occurred (R. 76–77):

Mr. McCABE. Now, Mr. Jones, you have heard, have you, of the loyalty test or loyalty investigation which is going on to test the loyalty of Government employees? Have you heard of that?

Mr. JONES. Yes, I have.

Mr. McCABE. Are you aware of the fact that one of the tests that might disqualify or prevent you from Government employ-

ment is friendly association with any Communist person or any Communist organizations?

Mr. JONES. That would not. I am a Civil Service employee. I have taken an examination for my job.

Mr. MCCABE. Yes. Are you aware of the fact that, despite any Civil Service protection, still a finding that you were in friendly association with any Communist or Communist organization would render you ineligible to continue in your Government position?

Mr. JONES. It would not.

Mr. MCCABE. What?

Mr. JONES. It would not.

Mr. MCCABE. Are you aware of the fact that it would render you, despite your Civil Service protection, ineligible?

Mr. JONES. No, I don't think it will.

Mr. MCCABE. Do you have any fear, any thought, that if you were selected as a juror in this case and you came to a decision, after hearing testimony, arguments of counsel, and the instructions of his Honor, that the Government had not made out a case beyond a reasonable doubt of the guilt of this defendant, and that you had honestly reached that conclusion—would the fact that you would go back among your fellow Government employees and perhaps have to answer questions as to how you found a Communist not guilty embarrass you or affect your consideration of the case?

Mr. JONES. No.
Mr. McCABE. You say "No"?
Mr. McCABE. No.
Mr. McCABE. You are sure of that?
Mr. JONES. Yes, sir.

The Government next challenged peremptorily Mr. Evans, a non-government employee (R. 79). Mr. Lineberger, self-employed as a general hauler, who had no business with the Government, took Evans' place in the box. He stated that he had no such prejudices against Communists or the Communist Party as would prevent him from rendering an impartial decision. (R. 80–81.)

Petitioner exercised his second peremptory challenge to exclude Mr. Borelli, a Federal Works Agency employee (R. 82; see p. 5, *supra*). Mr. Mackall, a mail carrier with 20 years' service, who replaced Borelli, stated that he had no prejudice against Communists or the Communist Party (R. 83). He was questioned specifically as follows (R. 84–85):

Mr. McCABE. Is there anything in your associations, thoughts, political or economic ideas which would put a Communist at a disadvantage when you came to consider his case?
Mr. MACKALL. No, sir.
Mr. McCABE. If you came to the conclusion, after hearing the evidence, the arguments of counsel, and the charge of this Court, that a verdict of not guilty was to

be rendered, would you hesitate to render such a verdict because this man is a Communist?

Mr. MACKALL. No, sir.

Mr. MCCABE. You are familiar with the Government loyalty test now going on?

Mr. MACKALL. Yes, sir.

Mr. MCCABE. You are familiar with the fact that friendly association with Communists might render you subject to dismissal from your employment?

Mr. MACKALL. Yes, sir.

Mr. MCCABE. Would that have any effect upon you in the consideration of the verdict in this case?

Mr. MACKALL. No, sir.

Mr. MCCABE. I mean, if you found that a verdict of not guilty was warranted, you could go back among your fellow Government workers without any apologies for your verdict?

Mr. MACKALL. Yes, sir.

Mr. MCCABE. Do you think it might subject you to any criticism or investigation in your department because you were a member of a jury which found a verdict of not guilty where a Communist was involved?

Mr. MACKALL. I do not think so.

Mr. MCCABE. Do you have any doubts about it?

Mr. MACKALL. No, I have not.

The Government exercised its third and last peremptory challenge (see Rule 24 (b), F. R.

Crim. P.) to exclude Mrs. Groce, an elevator operator at the Veterans' Administration (R. 86; see p. 6, *supra*). Mr. Neff, her replacement,[3] was employed at the Naval Gun Factory and had been in government employment about 12½ years. He stated that he was aware of the loyalty investigation of government employees and that friendly association with Communists might be held to be cause for dismissal. He denied, however, that a verdict of not guilty would subject him to criticism in his place of employment or that his fellow-employees would "look askance" at him if he "freed a Communist." (R. 89–90.)

Petitioner exercised his third and last peremptory challenge to excuse a non-government employee (R. 91). Mr. Parham, a press-helper at the Government Printing Office, who had been in government service for 25 years, was then called and stated, in reply to questions by petitioner's counsel, that he was familiar with the government loyalty investigation and that he had no fear of any criticism if he returned a verdict of not guilty (R. 92–93). The selection of a jury was then complete.[4]

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[3] Another juror who first replaced Mrs. Groce was excused by the court because he stated that he thought he had formed an opinion as to the guilt or innocence of petitioner (R. 86–87).

[4] Two alternate jurors, one of whom was a government employee (R. 102), were selected but neither participated in the verdict.

In summary, seven members of the jury as finally impaneled were government employees: two (Grant and Mackall) were mail carriers and another (Jones) a post office clerk, and the remainder were a card-punch operator in the Navy Department (Grigsby), a Naval Gun Factory employee (Neff), a Commerce Department clerk (Holford), and a press-helper at the Government Printing Office (Parham). The Government used its three peremptory challenges to excuse one government employee and two in private occupations, while petitioner excused two government employees and one in a private occupation. In addition, one juror (David), a government employee, was excused for cause for belonging to an anti-Communist organization (R. 65–66; see p. 6; *supra*) and six more, at least one of whom was privately employed (R. 73), were excused for cause for having formed opinions, or prejudice, two in the process of selecting the first twelve jurors (R. 74–75, 86–87; see pp. 9, 13, *supra*), and four in selecting the two alternates (R. 97–98, 98, 99, 100).

Petitioner was convicted as charged and a motion for a new trial, based in part upon the court's denial of his challenge for cause to all government employees, was denied (R. 353, 369). He was sentenced to imprisonment for one year and fined $1,000. The judgment of conviction was affirmed on appeal (R. 417).

SUMMARY OF ARGUMENT

The decision in *United States* v. *Wood*, 299 U. S. 123, established that partiality in criminal cases is not imputed as a matter of law to government employees solely by virtue of their employment; as the Court recently reiterated in *Frazier* v. *United States*, 335 U. S. 497, they are disqualified from jury service only if actual partiality exists. It was incumbent upon petitioner, therefore, in support of his challenge for cause, to show the existence of such special factors as required the trial court, in the exercise of a sound discretion, to find that the government employees would be partial in this case. The only special circumstance upon which petitioner relied was the program for investigating the loyalty of government workers. But there is no basis whatever for a sweeping inference that this program had caused such apprehension among government employees that they must be deemed incapable of fairness and impartiality in a case involving a Communist.

Each prospective juror, on *voir dire* examination, in response to a series of searching questions, categorically denied that the loyalty program would affect his verdict in any way. While a person's opinion of his own impartiality is, of course, not conclusive, it is certainly important evidence of his state of mind. The existence of fear which is claimed by petitioner to be so

intense as to deter government employees from any conduct seemingly favorable to a Communist, even to the point of perverting his sworn duty as a member of a jury, and to be so debilitating as to render worthless the juror's own statement that he is impartial, was not shown by any evidence or offer of proof. It certainly was not so notorious that, in the absence of proof or an offer of proof of its existence, the court should have imputed it as a matter of law. Such an implication of bias was particularly unwarranted in this case since the issues presented to the jury were so narrow that a vote for petitioner's acquittal could not reasonably be believed to invite any suspicion of disloyalty on the part of government employee jurors. Petitioner's attempt to support his challenge for cause was limited to the vague reference to the "loyalty test," and the trial court's ruling that actual bias had not been shown was a proper exercise of discretion and should not be disturbed.

ARGUMENT

PETITIONER FAILED TO ESTABLISH SUCH BIAS AGAINST HIM ON THE PART OF GOVERNMENT EMPLOYEES IN THE CIRCUMSTANCES OF THIS CASE THAT THE TRIAL COURT SHOULD HAVE EXCLUDED THEM FROM THE JURY WHICH TRIED HIM

Petitioner contends that in the circumstances of this case, involving, as it does, charges initiated by the House Committee on Un-American Activities against a Communist leader, it must be pre-

sumed as a matter of law that all government employees were biased against him, and, therefore, the presence of seven such employees on the jury which tried him constituted a deprivation of the right to an impartial jury guaranteed by the Sixth Amendment. His argument rests primarily on the hypothesis that government employees fear that if they vote for the acquittal of a prominent Communist, no matter on what charge or how flimsy the evidence, their loyalty might thereby become suspect and their jobs endangered. The trial court, in overruling the challenge for cause on the sole ground of government employment, determined that the seven government employees were actually disinterested and capable of rendering a fair and impartial verdict. The ruling, we submit, was a proper exercise of the discretion vested in the trial court in ruling on challenges of this kind.

Challenges to the polls for partiality or bias are divided into challenges for principal cause (for "implied bias") and challenges to the favor (for "actual bias"). See *United States* v. *Wood*, 299 U. S. 123, 135. Jurors are disqualified on challenge for principal cause if such a personal relation with one of the parties is established as in the judgment of law conclusively imports favor in behalf of that party or bias against the other. Examples of such a relationship are kinship to one of the parties or an interest in the outcome of the case. Upon the establishment of the fact that any

such factors exist, the disqualification is absolute and no evidence of the existence of actual partiality is required. Nor is any discretion permitted the trial court to determine whether the relationship would so affect a particular juror that he would be incapable of an impartial verdict.

Challenges to the favor, on the other hand, are based upon the existence of such actual bias on the part of the individual juror, in reference to the case or to either party, arising from any circumstance whatever, as satisfies the trial court, in the exercise of its sound discretion, that such juror cannot try the issues impartially and without prejudice to the substantial rights of the party challenging.

In the *Wood* case, the challenges for principal cause to three federal employees on the jury raised the question of the existence of "implied bias, a bias attributable in law to the prospective juror regardless of actual partiality. The contention of the defendant is that there must be read into the constitutional requirement an absolute disqualification in criminal cases of a person employed by the Government—a disqualification which Congress is powerless to remove or modify." 299 U. S. at 134. The Court rejected that contention and held that government employees are not subject to challenge for principal cause in criminal cases, for no such absolute disqualification existed at common law and, even if it had,

Congress had power to remove it and properly did so by the Act of August 22, 1935, c. 605, 49 Stat. 682, D. C. Code (1940) § 11–1420. This holding overruled the 1909 decision in *Crawford* v. *United States*, 212 U. S. 183, to the extent that it rested upon an absolute disqualification of government employees.

The *Wood* decision does not mean, of course, that government employees are immune to challenge for cause; it means simply that they cannot be challenged for bias imputed as a matter of law by virtue of their employment. Challenges to the favor, i. e., for actual bias or partiality, were unaffected by the decision, as the Court carefully explained (p. 150):

> • • • We repeat, that we are not dealing with *actual bias* and, until the contrary appears, we must assume that the courts of the District, with power fully adequate to the occasion, will be most careful in those special instances, where circumstances suggest that any actual partiality may exist, to safeguard the just interests of the accused. [Italics supplied.]

Since, as Chief Justice Hughes, writing for the Court, pointed out (299 U. S. at 149), "the imputation of bias simply by virtue of government employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation," the Wood

decision establishes that challenges, other than those traditionally regarded as being within the category of challenges for principal cause, imposed upon the trial court,[5] in respect of each prospective juror—in this instance, each government employee—the duty "to discover whether in view of the nature and circumstances of his employment or the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him" (p. 134). See also *Frazier* v. *United States*, 335 U. S. 497, 510–511. In the instant case, therefore, petitioner's challenge to all government employees required the trial court to consider all the evidence adduced or offered in respect of the impact of the loyalty program upon the mental attitude of such jurors, and to exercise a sound discretion in determining whether, in the light of these factors they could judge impartially in a case in which the accused happened to be a Communist.

Petitioner's argument that all government employees were disqualified as "a matter of law" from serving as members of the jury which tried him, and, therefore, that evidence that there was

[5] 28 U. S. C. (1946 ed.) 424, in effect at the time of petitioner's trial, provides that "all challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers." This provision, with minor changes in phraseology, now appears at 28 U. S. C. 1870.

no actual bias on the part of such jurors was immaterial, ignores the distinction between challenges for principal cause and challenges to the favor. Since, as the *Wood* and *Frazier* decisions make clear, challenges simply on the basis of government employment are outside the traditional scope of challenges for principal cause, the validity of petitioner's challenge turns upon the showing made of actual partiality arising from the special "nature or circumstances of [an individual's] employment or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise." 299 U. S. at 134. The inquiry is not limited, of course, to prejudice in the conscious sense—that is, to the individual juror's belief in his own impartiality. Conceivably, a combination of extraordinary circumstances may exist whereby such a strong inference of actual, albeit unconscious, bias or predisposition may arise as to override the individual's conscious belief that he is impartial. Cf. *Frazier* v. *United States,* 335 U. S. at 511. But since there is no *a priori* basis for holding that government employees as a class are partial, the trial court has a discretion and duty to weigh all relevant factors in order to determine whether actual partiality exists.

An important factor was the nature of the issues in this case. Petitioner was charged with contempt of a Congressional Committee. The issues for the jury were solely and simply whether

the Committee had ordered petitioner to appear and testify and whether he had intentionally disobeyed that command. The evidence relating to those issues was undisputed. There was no controversy over what occurred when petitioner was summoned by the Committee; the only real issues were matters of law.

The trial court, aided by its experience of daily contact with jurors, has the benefit of personal observation of prospective jurors which enables it to gain an impression of their intelligence, fairness, and sense of duty. As the court so aptly stated in *Press Pub. Co.* v. *McDonald*, 73 Fed. 440, 442 (C. A. 2), certiorari denied, 163 U. S. 700:

> Challenges in the federal courts to the favor are tried by the court * * * and an alleged error in the decision which is duly excepted to is the subject of review by the appellate court. But it must be remembered that the question before the trial judge, although one of mixed law and fact, is, in the main, a question of fact, and that, while he may be sometimes wrongly influenced by a desire to expedite the trial, or by impatience of delays, yet, if his mind is undisturbed, the impression which the juror makes of his intelligence, fairness, and evenness of mind, from a personal inspection of him, and the belief, in regard to his probable character, which is

> created by his appearance under examination, his bearing and willingness to disclose the nature and extent of his preconceived opinions, are valuable, and have deserved weight before an appellate court, and therefore the finding of fact by the trial court will not be set aside except for manifest error.

The conclusion of a trial judge that no actual bias has been shown is entitled to great weight where, as here, extreme latitude was allowed on the *voir dire* examination to inquire fully as to the existence of bias or prejudice on the part of the seven government employees, and no conscious bias or self-interest was revealed. Each government employee stated unequivocally under oath, in response to penetrating questions, that he had no fear that a verdict in petitioner's favor would impair his standing as a loyal government worker. (R. 55, 56, 68, 76–77, 84–85, 89–90, 92–93.) The following examination of Juror Neff (R. 89–90) is typical:

> Mr. McCabe. Mr. Neff, are you with the Naval Gun Factory is it?
>
> Mr. Neff. Yes.
>
> Mr. McCabe. How long have you been in the Government employ?
>
> Mr. Neff. About 12½ years.
>
> Mr. McCabe. Does your employment bring you into any close contact with members of the F. B. I.?
>
> Mr. Neff. No, sir.

Mr. McCABE. Or other Government agencies?

Mr. NEFF. No, sir.

Mr. McCABE. Members of the House Un-American Committee?

Mr. NEFF. No, sir.

Mr. McCABE. Have you followed the activities of the House Committee on Un-American Affairs?

Mr. NEFF. No, I have not.

Mr. McCABE. You are aware of the fact that a loyalty test or investigation is now going on to determine the fitness of Government employees to remain in the employ of the Government?

Mr. NEFF. Yes.

Mr. McCABE. And are you aware of the fact that friendly association with Communists might be held to be cause for dismissal?

Mr. NEFF. Yes, sir.

Mr. McCABE. Knowing that, do you feel, when you came to the consideration of the case, in which, as here, a high official of the Communist Party is the defendant, that the finding of a verdict of not guilty, if you conscientiously arrived at such a verdict, that verdict would subject you to criticism in your place of employment?

Mr. NEFF. No, sir.

Mr. McCABE. You do not think that your fellow employees would look askance at you because you had freed a Communist?

Mr. NEFF. No, sir.

Mr. McCabe. Or members of the House Un-American Committee had appeared and testified against him?

Mr. Neff. No, sir.

Mr. McCabe. It would not have any effect on you at all?

Mr. Neff. No, sir.

Granted that one's opinion of his own impartiality is not conclusive, still the statements under oath by persons who presumably had no interest in serving and readily could have expressed a preference to be excused, are at least primary evidence of their disinterest and impartiality. They are competent and relevant and are entitled to great weight. "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself." *People* v. *Reyes*, 5 Cal. 347, 349, quoted with approval in *Aldredge* v. *United States*, 283 U. S. 308, 313, n. 3. And it should be noted in this connection that six prospective jurors did in fact indicate prejudice arising from newspaper accounts and other sources, and they were excused (*supra*, p. 14).

Petitioner contends that government employees are incapable of objectivity and cannot truthfully say whether they have the proper mental attitude of disinterest and, therefore, despite their avowals to the contrary, bias must be conclusively imputed. Individuals with little or no recognition of their subconscious motivations may indeed

find it difficult correctly to appraise their bent of mind. For deep below consciousness are the attractions and repulsions, the desires and fears, the likes and dislikes—in short the complex of forces which make the man. Cf. Cardozo, *Nature of the Judicial Process,* pp. 167–177. And, human limitations being as they are, perhaps complete objectivity—the subjugation of all prejudices, desires, fears, emotions in general—may be as unattainable among jurors as among other members of our society. But, as Chief Justice Hughes admonished in the *Wood* case (299 U. S. at 150), "While bias, as has been said, is an 'elusive condition of the mind,' that consideration affords no ground for extreme and fanciful tests." Our system of administering criminal justice, imperfect though it may be in theory, requires for its practical operation some demonstrable reason—more than mere hypothesis or conjecture—for branding a large segment of the population as incapable of a dispassionate judgment.

If, as petitioner urges, the jurors' opinions of their state of mind are to be discounted completely, it must be upon the basis that there were prejudice-causing factors of so overwhelming a nature that conscious belief was rendered worthless. He contends, in effect, that the jurors were afraid even to admit that they feared the results of a vote of acquittal because a statement that

such fear existed would itself be damaging to their interests. But the fact that four government employees,* Raybould, Richardson, Scott and Rensberger, who were summoned to act as jurors, admitted actual bias and were excused by the trial judge (R. 97–98, 98, 99, 100) strongly suggests the opposite. In any event, no such charge was made in the trial court and no offer was made to produce any evidence in support of the challenge: no evidence, for example, of efforts by superior officials or members of Congress to intimidate them in any way; no evidence, based on surveys, polls, observations of reporters, or otherwise, of the reactions, either of particular government employees or the group as a whole, to the loyalty program; and no expert opinion as to the effect of the program upon their mental attitudes.† In short, no support whatever of the challenge for cause was tendered except the mere statement of petitioner's counsel: "I think the reasons are clear to us all without argument, Your Honor * * * this loyalty test does bring a new shade into the

*The occupation of these four jurors is shown by the list of prospective jurors from which the jury was selected. This list is reprinted as the Appendix to this brief, *infra*, pp. 32–33.

†An affidavit which had been filed by one of petitioner's attorneys in support of a motion for change of venue contained assertions by three newspaper columnists to the effect that government employees were afraid to purchase literature, or attend meetings, that might be termed "radical" (R. 27–32). But no attempt was made to offer even these opinions in support of the challenge for cause.

case. It is for that reason that I was urging that at this time" (R. 64–65). The loyalty order (Executive Order 9835, issued March 21, 1947, 12 Fed. Reg. 1935) could be and presumably was judicially noticed, of course. But no attempt was made by petitioner to bridge the crucial gap between the terms of the order and the alleged creation of such intimidation and fear on the part of those persons subject to the order that they should be deemed incapable of rendering a fair verdict. Instead, this Court is now asked to hold as a matter of law that all government employees are so intimidated by fear of the consequences of any action seemingly favorable to a Communist that they are incapable of answering truthfully on *voir dire* or of discharging their sworn duty as jurors to base their verdict solely on the evidence and the instructions of law.* To ask this Court to find that such matters are "actually so notorious to all" (see Wigmore, *Evidence*, § 2571) as to warrant the invocation of the principle of judicial

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*The jury was carefully instructed by the court (R. 333):

"* * * Bear in mind that you are a fact-finding body and it is your duty to determine the facts uninfluenced by passion or prejudice or any other emotion.

"Now, the fact that the defendant is a Communist should not prejudice you for or against him. He is entitled to the same calm, fair, impartial trial as any other person, irrespective of his political or economic beliefs or philosophic views. Neither is he on trial for being a Communist. * * *"

notice, is to exceed the limits of reality. This is particularly true in this case because the narrow issues for the jury's determination were of such a nature that a vote for acquittal could not reasonably support any imputation of disloyalty on the part of the government employee jurors.

Petitioner had the burden of tendering proof in support of his charge of partiality. Cf. *Frazier* v. *United States,* 335 U. S. at 503; *Glasser* v. *United States,* 315 U. S. 60, 87. Not only did he fail to support his challenge, unless the vague reference to the "loyalty test" may be so construed, but his affirmative attempts to elicit from the seven government employees some acknowledgment of partiality met with sworn categorical denials. Under those circumstances, the trial court's determination that cause for challenge had not been demonstrated was manifestly correct.

A great deal must, of necessity, be left to the trial court's sound discretion in appraising the credibility and fairness of prospective jurors. In the absence, as here, of a clear abuse of that discretion in overruling the challenges for cause, this Court should not disturb the finding that despite their government employment the jurors could act impartially. Cf. *Reynolds* v. *United States,* 98 U. S. 145, 156; *Spies* v. *Illinois,* 123 U. S. 131, 179; *Connors* v. *United States,* 158

U. S. 408, 413. As Mr. Justice Holmes observed in *Holt* v. *United States*, 218 U. S. 245, 249:

> * * * The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which is far from being in this case.

And, as the Court stated in the *Wood* case (p. 150-151):

> * * * the spectacle of the exclusion *en masse* from * * * [jury service] of citizens otherwise highly desirable in point of intelligence and character—solely by reason of their employment by the Government—and the imposition in consequence of a heavier burden upon other citizens * * * would constitute a serious reproach to the competency and efficiency of the administration of the system of jury trials.

Finally, as Mr. Justice Murphy pointed out in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220:

> * * * Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. *Jury competence is an individual rather than a group or class matter.* That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the demo-

cratic ideals of trial by jury. [Italics supplied.]

For the trial court on this record to have excluded all government employees would have given countenance to the charge, in support of which no evidence was offered, that fear of being investigated is so deep-seated that they are incapable of sufficient objectivity to be fair to a Communist on trial. The trial court refused to hold—properly so, we submit—that any impairment of their normal fortitude and independence had been so demonstrated as to require their absolute disqualification in cases of this type.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment below should be affirmed.

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NOVEMBER 1949.

APPENDIX

Jurors Criminal Court No. Two—June 1947

	Age	Address
1. Aristide L. Borelli (Govt.)	54	618 G St. NE. Stone Mason—F. W. A.
2. Paul B. Burke	40	1915 R St. SE. Litho.—Wash. Planograph Co.
3. Mrs. Annie Johnson Darby	30	1204 V St. NW. Housewife
4. Andrew M. David (Govt.)	43	113 C St. SE. Mechanic—F. W. A.
5. Clinton M. Evans	29	211 Elm St. NW., Rm. 200 Cook—Hollywood Grill
6. Mrs. Nancy Pennington Furlow (Govt.).	51	550 Peabody St. NW. Class. Clk. Bureau Census
7. Mrs. Elizabeth Morton Gingrich.	24	1931 Biltmore St. NW. Housewife
8. Stanley D. Grant (Govt.)	53	123 Adams St. NW. Letter Carrier—P. O.
9. Mrs. Amanda E. Grigsby (Govt.).	46	720 Park Rd. NW. Card Punch Opr. Navy Dept.
10. Mrs. Bessie M. Groce (Govt.)	47	208 F St. SW. Vet. Admn. Elev. Cond.
11. Leroy Harris	60	231 Oglethorpe St. NW. Mgr. Auto Parts, Wellborn Motors
12. Arthur Hirsh	46	7440 Georgia Ave. NW. #105 Partner Plumbing Supply
13. Mrs. Elizabeth Levine Holford (Govt.).	35	1314 Mass. Ave. NW. #204 Comm. Dept. Stat. & Clerk
14. William O. Howard	39	1613 F St. NE. #4 Street Car Operator
15. Mrs. Margaret T. Iglehart	61	814 11th St. NE. Marvin Credit—Addresso.
16. Frank E. Jones (Govt.)	54	1836 Swann St. NW. P. O. Clerk
17. James L. Lineberger	48	942 O St. NW. Self-Hauling & Moving
18. Harold W. Mackall (Govt.)	44	841 Howard Rd. SE. P. O. Letter Carrier
19. Jacob Mehlman	52	2734 Woodley Rd. NW. Part owner Liquor Store
20. Fred E. Neff (Govt.)	41	1317 44th Pl. SE. Machinist—Naval Gun Fact.

	Age	Address
21. Percy Parham (Govt.)	42	2213 N St. NW. #2 G. P. O.
22. Milton M. Perlman	45	301 Hamilton St. NW. #8 Partner—Whisle. Gen. Merch.
23. Garvin E. Peterson	45	4607 Conn. Ave. NW. #621 Slsmn. Steam Shovel in Phila. & Harrisburg
24. Merrill E. Raybould (Govt.)	35	128 C St. NE. #33 G. P. O. Foreign Reader
25. Marion C. Rensberger (Govt.)	32	1741 Trinidad Ave. NE. #10 G. A. O. Prop. & Supp. Clk.
26. William W. Richardson (Govt.).	49	3600 20th St. NE. G. A. O. Auditor
27. Miss Arabella J. Scott (Govt.)	36	1330 L St. NW., Secy. Tariff Commission
28. John M. Scott (Govt.)	60	1515 Swann St. NW. Treas. Dept. Mimeographic
29. Lloyd V. Streifuss	35	4019 Foote St. NE. Capital Airlines
30. Miss Beulah E. Wolfe (Govt.)	46	2150 Pa. Ave. NW. #310 F. B. I.—Teacher

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